Cahya Makmur Holdings (Melaka) Sdn Bhd v Heap Huat Rubber Co Sdn Bhd & Anor

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 24–83 OF 1991
LC VOHRAH J
14 NOVEMBER 1991

Land Law *— Private caveat — Purchaser of land assigning rights of purchaser to another party — Whether purchaser continues to have a caveatable interest in land — National Land Code 1965 s 323*

Land Law *— Private caveat — Extension of private caveat ordered by court on ex parte application — Rights of caveator to land already assigned to another party — Assignment not disclosed to court — Whether caveatee entitled to have caveat removed*

By a sale and purchase agreement, the plaintiff agreed to buy a piece of land from the first defendant. With the consent of the first defendant, by a deed of assignment, the plaintiff later assigned in favour of a company named Gerimismas Sdn Bhd all its rights title and interest in the land and under the agreement. Subsequently, the plaintiff lodged a private caveat in respect of the land. The first defendant applied to the second defendant who was the Registrar of Titles of the state of Johore for the cancellation of the caveat. The second defendant issued to the plaintiff a notice in Form 19C of the National Land Code 1965 pursuant to s 326 of the Code intimating that he would cancel the caveat upon the expiry of one month from the date of the service of the notice upon the plaintiff unless the caveat was extended by the court. By way of an ex parte application the plaintiff then obtained an order for extension from the court. The first defendant applied to have the caveat set aside essentially on two grounds, namely: (1) that the plaintiff had no caveatable interest because it had assigned all its rights in the land; and (2) that the plaintiff had obtained the order for extension of the caveat without disclosing the material fact that there had been an assignment of the plaintiff's interest in the land.

Held, allowing the first defendant's application:

(1) The essential requirement is that the person who enters a private caveat must claim title to or a registrable interest in the land or a right to such title or interest.

(2) The onus is on the caveator who is not the registered owner to show, on the affidavit evidence presented, firstly a triable issue and, secondly, on the balance of convenience, that it is better to maintain the caveat.

(3) As a result of the execution of the deed of assignment the plaintiff had in law divested itself of all its rights to the land. The effect was that it could not anymore, as a matter of logic, have any right to claim a caveatable interest in the land.

(4) The failure of the plaintiff to disclose the existence of the deed of assignment in its ex-parte application warranted the setting aside of the order for the extension of the caveat as a matter of right.

[Bahasa Malaysia summary

Melalui satu perjanjian jual-beli, plaintif bersetuju membeli sebidang tanah dari defendan pertama. Dengan persetujuan defendan pertama, melalui satu suratikatan serahhak, plaintif kemudiannya menyerahhak kepada satu syarikat bernama Gerimismas Sdn Bhd semua hak hakmilik dan kepentingannya di dalam tanah dan di bawah perjanjian itu. Selepas itu, plaintif telah memasukkan satu kaveat terhadap tanah itu. Defendan pertama memohon kepada defendan kedua yang merupakan Pendaftar Hakmilik Negeri Johor untuk pembatalan kaveat itu.

Defendan kedua mengeluarkan satu notis dalam Borang 19C Kanun Tanah Negara 1965 kepada plaintif menurut s 326 Kanun itu untuk memberitahunya bahawa beliau akan membatalkan kaveat itu selepas habisnya tempoh satu bulan daripada tarikh penyerahan notis itu kepada plaintif melainkan kaveat itu dilanjutkan oleh mahkamah. Melalui satu permohonan ex parte plaintif telah memperolehi satu perintah perlanjutan daripada mahkamah. Defendan pertama memohon untuk mengetepikan kaveat itu khususnya atas dua alasan, iaitu: (1) bahawa plaintif tidak ada kepentingan yang boleh dikaveat kerana ia telah menyerahhak kesemua kepentingannya di dalam tanah itu; dan (2) bahawa plaintif telah memperolehi perintah perlanjutan kaveat itu tanpa mendedahkan fakta penting bahawa penyerahanhak kepentingan plaintif di dalam tanah itu telah berlaku.

Diputuskan, membenarkan permohonan defendan pertama itu:

(1) Kehendak yang penting ialah seseorang yang memasukkan satu kaveat persendirian mesti menuntut hakmilik kepada atau satu kepentingan yang boleh didaftar di dalam tanah itu atau satu hak kepada hakmilik atau kepentingan sedemikian.

(2) Beban terletak di atas pengkaveat yang bukan tuanpunya berdaftar untuk menunjukkan, mengikut keterangan afidavit yang dikemukakan, pertamanya satu isu yang boleh dibicarakan dan, keduanya, atas imbangan kemudahan, bahawa adalah lebih baik untuk mengekalkan kaveat itu.

(3) Berikutan dengan perlaksanaan suratikatan penyerahanhak itu, plaintif mengikut undang-undang telah melucutkan kesemua haknya ke atas tanah itu. Kesannya, ia tidak lagi boleh, secara lojik, mempunyai sebarang hak menuntut satu kepentingan yang boleh dikaveat di dalam tanah itu.

(4) Kegagalan plaintif mendedahkan kewujudan suratikatan penyerahanhak itu di dalam permohonan ex partenya menyokong pengetepian perintah perlanjutan kaveat itu secara wajib.]

Cases referred to

1 *Eng Mee Yong v V Letchumanan* [1979] 2 MLJ 212 (folld)

2 *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Lee* [1985] 1 CLJ 449 (folld)

Legislation referred to
National Land Code 1965 ss 323, 326

GS Nijar (*Nijar & Nijar*) for the first defendant.
AK Lee (*Yee Ling & Co*) for the plaintiff.

Cur Adv Vult

LC Vohrah J (delivering an oral judgment): I must begin by expressing my reservations about the propriety of these proceedings before me as I am in effect being asked to review the discretion that was exercised by my brother judge in Melaka in granting an order extending the caveat of the plaintiff upon an application made ex parte before him. I am bound to hear the present application as there is a sealed order of the High Court at Melaka for the present action to be transferred to the High Court at Johore Bahru and the comment I wish to make is that the application for the transfer that was made by solicitors acting on behalf of the first defendant was rather premature for it should more properly have been made only after the learned judge who granted the extension had heard the application to set aside his order as he was readily available. So much by way of preface.

The facts of this case are quite straightforward. By a sale and purchase agreement between the plaintiff and the first defendant dated 10 December 1988 (see exh 'ESH', encl (2)), the first defendant agreed to buy a piece of land registered under Grant 225081, Lot No 24, Mukim of Pulai, District of Johore Bahru. The purchase price was $1,600,000 and the plaintiff paid $80,000 by way of deposit and part payment. The balance of the purchase price was to be settled within three years from the date of the agreement and the first defendant was required to obtain the removal of the lien-holder's caveat which had been lodged in respect of the land. This caveat has not been removed and the plaintiff on 19 July 1990 lodged a private caveat in respect of the land. The first defendant then applied to the second defendant for the cancellation of the private caveat and the second defendant pursuant to s 326 of the National Land Code 1965 issued a notice in Form 19C to the plaintiff intimating that he would cancel the caveat upon expiry of one month from the date of the service of the notice upon the plaintiff unless the caveat was extended by the court. Hence the application for extension at the High Court at Melaka on 17 July 1990.

The present application to set aside the private caveat is based essentially on two grounds:

(1) that the plaintiff has no caveatable interest because it has assigned all its rights in the land; and
(2) that the plaintiff obtained the extension order from the High Court at Melaka without disclosing the material fact that there had been an assignment of the plaintiff's interest in the land.

Section 323 of the Code specifies who may enter a private caveat. The essential requirement is that the person who enters a private caveat must claim title to, or a registrable interest in the land or a right to such title or interest. It is clear from the principles enunciated in the case of *Eng Mee Yong v V Letchumanan*[1] that the onus is upon the caveator who is not the

registered owner to show on the affidavit evidence presented, firstly, a triable issue and, secondly, on the balance of convenience it is better to maintain the caveat.

The first defendant contends that based on the plaintiff's own document, the deed of assignment (see exh 'ESH–3', encl (23)) executed by the plaintiff as 'the assignor' in favour of Gerimismas Sdn Bhd as 'the vendor', the plaintiff had no caveatable interest in the land at the time it applied for and obtained the extension of the caveat on 20 September 1991. The deed was executed with the consent of the first defendant on 20 December 1989, well before that date. I shall now refer to the relevant provisions of the deed.

Recital 4 reads:

> The Assignor has agreed to assign to the Assignee all those the Assignor's rights title and interest in the said land and under the principal agreement and the Vendor has consented to such assignment.

Clause 1 reads:

> In consideration of the sum of $80,000 now paid by the Assignee to the Assignor (the receipt whereof the Assignor hereby acknowledges) and further in consideration of the Assignee permitting the Assignor occupation of the said land the Assignor hereby assigns to and unto the Assignee all those the Assignor's rights title and interest in the said land and under the principal agreement to hold the same unto the Assignee as if the Assignee were a party to the principal agreement in lieu of the Assignor.

Clause 4 reads:

> The parties hereby declare and acknowledge that as from the date hereof the Assignee shall be the lawful and equitable owner of the said land and that the Assignor shall have no claim whatsoever thereto or to any part thereof.

The language of the above provisions, in my view, brooks of no ambiguity and leads only to one conclusion, namely, that an absolute assignment of all the plaintiff's rights and interests in the land to Gerimismas Sdn Bhd was effected by the execution of the deed. The plaintiff, nevertheless, contends that it still has a caveatable interest because of its obligation to protect the rights of the assignee over the land as the assignee's rights were obtained through it. I find this contention difficult to uphold. As a result of the execution of the deed of assignment itself the plaintiff has in law divested itself of all its rights to the land when it assigned its 'right title and interest in the said land' on 20 December 1989 to Germismas Sdn Bhd. The effect is that it cannot anymore, as a matter of logic, have any right to claim a caveatable interest in the land. It therefore has no locus standi even to begin to show that there is a triable issue. On this ground alone the order granted by the High Court at Melaka on 21 September 1990 must be set aside.

Now to the second ground. The effect of failure in disclosing a material fact in an ex parte application has been clearly stated by Edgar Joseph Jr J in *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Lee*[2] (p 458, para 34):

> It is settled law that when a party applies ex parte, full disclosure of all material facts must be made and that the doctrine of uberrima fides applies by analogy: per Davies LJ in *Beese & Ors v Woodhouse & Ors* [1970] 1 WLR 586. For this

reason, where material facts have been withheld, the ex parte order may be set aside irrespective of the merits: *Castelli v Cook* [1849] 7 Hare 89; 68 ER 36 and *Dalglish v Jarvie* [1850] 2 Mac & G 231 (Macnaghten & Gordon's Reports Vol 2). The fact that the party in whose favour the ex parte order was made may think the facts misstated or concealed not material or may have forgotten them affords no excuse: *The King v The General Commissioners for the Purposes of the Income Tax Act for the District of Kensington* [1917] 1 KB 486. Furthermore, where there has been suppression of facts, the question of balance of convenience does not arise: *MRK Nayar v Ponnusamy & Ors* [1982] 2 MLJ 174.

In my view, the failure by the plaintiff to disclose the existence of the deed of assignment in its ex parte application warrants the setting aside of the order granted by the High Court at Melaka as a matter of right.

In the result, I make an order in terms of prayers 1 and 2 and for the costs of and incidental to the present application to be paid by the plaintiff.

Application allowed.

Reported by PS Ranjan